

1992

Randy R. Krantz v. Utah Department of Commerce, Division of Real Estate and Utah Real Estate Commission : Response to Respondent's Petition for Rehearing

Utah Court of Appeals

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CHIEF,

DOCKET NO. 920487CA

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Utah Court of Appeals

JUN 07 1993

IN THE UTAH COURT OF APPEALS

Mary T. Noonan
Mary T. Noonan
Clerk of the Court

RANDY R. KRANTZ,
Petitioner,

v.

Case # 920487-CA

UTAH DEPARTMENT OF COMMERCE,
DIVISION OF REAL ESTATE AND
UTAH REAL ESTATE COMMISSION,
Respondent.

RESPONSE TO RESPONDENT'S PETITION FOR REHEARING

Petition for Review of Order on Review of
Utah Department of Commerce and Order of
Utah Real Estate Commission and
Utah Division of Real Estate

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INTRODUCTION

Respondent states in its Petition that it does not request a review of the Court's finding that Krantz was substantially prejudiced by the Real Estate Commission's failure to allow Krantz the opportunity to exercise his statutory right to apply to the Commission for reconsideration of the Commission's Order. Instead it seeks clarification that the Court's remand is based on statutory violation rather than on constitutional grounds. (See Respondent's Petition, 5.)

Krantz reads the Court's decision as holding that the statute, not the Constitution, was violated. Therefore the Court's decision should stand without modification. However, Krantz would not object to any modification of the decision deemed desirable to clarify its holding.

STATEMENT OF ISSUES PRESENTED ON PETITION FOR REHEARING

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

Krantz agrees with Respondent's Statements with regard to the matters set forth above. (See Respondent's Petition, 1-2.)

SUMMARY OF ARGUMENT

The Court holds in its decision that the matter is to be remanded because Krantz was denied his statutory right to apply to the Real Estate Commission for reconsideration. The Court's statements in dicta are correct regarding the nature of the statutory right denied; and the Court's discussion of due process in dicta simply provides a link to establish substantial prejudice.

ARGUMENT

Point 1: RESPONDENT'S RELIANCE UPON UTAH CODE SECTION 63-46b-13 FOR CONCLUDING THAT RECONSIDERATION IS NOT A STATUTORY RIGHT IS MISPLACED.

The concepts of "review" and "reconsideration" are not synonymous. Review is conducted by one who was not involved in the decision being reviewed, for example, this Court reviewing the decision of the Real Estate Commission. However, reconsideration is conducted by the maker of the decision, for example, this Court reconsidering its rationale for remanding a matter to the Real Estate Commission. See LeJeune v. Clallam County, 823 P.2d 1144 (Wash.App. 1992) for an illustration of the meaning of "reconsideration". Therefore only statutory and regulatory provisions regarding reconsideration of the **Commission's** order control this petition for rehearing.

Utah Code Section 63-46b-10(1) provides that, in this case, the Commission's order must include: under (e), a notice of the right to apply for reconsideration; and under (f), a notice of **any** right to administrative or judicial review of the order available to aggrieved parties. [Emphasis added.]

Utah Code Section 63-46b-12(1)(a) provides procedures for requesting **agency review** "[i]f a statute or the agency's rules permit parties ... to seek review" Section 63-46b-12(6) makes it clear that the section applies to an "order on review".

Utah Code Section 63-46b-13 provides procedures for requesting **reconsideration** of an agency's order if "review by the agency or by a superior agency under Section 63-46b-12 is unavailable". Utah Administrative Code R151-46b-12 provides for agency review of an adjudicative proceeding such as the Krantz matter and results in the issuance of an "order on review". Therefore, the Krantz matter is subject to Utah Code Section 63-46b-12 with regard to the issuance of an order on review. **However, by reason of the very fact that the Krantz matter is subject to Section 63-46b-12 for determining procedures for review, it is not subject to Section 63-46b-13 for determining procedures for reconsideration of matters which do not result in the issuance of an order on review.**

Utah Code Section 61-2-12(1)(b) addresses reconsideration of the Real Estate Commission's order. However, the wording of the section that one "may **request** reconsideration" [emphasis added] is, standing alone, an insufficient basis for

concluding that a right to reconsideration does not exist. The requirement that there be a request for reconsideration allows for the waiver of one's right to reconsideration by failing to make such a request.

Reconsideration of the Commission's order (an "initial order") is treated differently from reconsideration of an "order on review" under Section 63-46b in that there is no provision for an agency's limiting reconsideration of its initial order. Thus one may account for the distinct treatment of reconsideration under section 63-46b-10(1)(e) from the treatment of review under section 63-46b-10(1)(f) and for the Court's conclusion that reconsideration in the Krantz matter is available as a matter of statutory right.

Point 2: FAILURE TO GIVE REQUISITE NOTICE OF RIGHT CONSTITUTES DENIAL OF THAT RIGHT.

Holm v. Smilowitz, 840 P.2d 157 (Utah App. 1992), deals with the denial of a hearing when one has been requested. In Krantz's case, he has been denied notice, required for the reasons stated above, of his right to reconsideration. Even if "reconsideration" and "hearing" are not synonymous, the right to reconsideration represents an **opportunity** to be heard; and it is this opportunity to be heard which due process protects and which Krantz has been denied by the Commission's failure to give him the requisite notice under Section 63-46b-10 (1)(e). Thus it may be correctly concluded that the lack of requisite notice constituted a denial of a right substantially prejudicial to Krantz.

Point 3: THE COMMISSION'S FAILURE TO NOTIFY KRANTZ OF HIS
RIGHT TO RECONSIDERATION CONSTITUTES A VIOLATION
OF STATUTORY LAW.

The Court's holding in the Krantz matter is that his statutory right to notice under Section 63-46b-10(1)(e) was violated and that by reason of this violation Krantz suffered substantial prejudice. The holding does not rest on constitutional grounds. Instead, the underlying link between the statutory right denied and due process concerns provides a basis for finding substantial prejudice.

CONCLUSION

For the reasons set forth above, Krantz contends that there should be no rehearing of this matter and that the Court's decision should stand.

RESPECTFULLY SUBMITTED this 7th day of June, 1993.


Thomas F. Rogan

PROOF OF SERVICE

I, Thomas F. Rogan, certify that on June 7, 1993, I personally provided TWO COPIES of the attached Petitioner's Response to Respondent's Petition for Rehearing to Jan Graham, Utah Attorney General and L. A. Dever, Assistant Utah Attorney General, counsel for respondent in this matter, by mailing to them the foregoing by first-class U. S. Mail, postage pre-paid at the following address:

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